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CHINA CONSTRUCTION PEARL RIVER (M) SDN BHD v. INDUSTRIAL AND COMMERCIAL BANK OF CHINA (MALAYSIA) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIM CHONG FONG J
B [ORIGINATING SUMMONS NO: WA-24C(ARB)-50-09-2021]
29 MAY 2022

Abstract – *An application for an injunction to restrain the pay-out and receipt of a performance bond monies pending the resolution of disputes pursuant to a construction contract in arbitration proceedings ought to be allowed when concerns on losses and damages are premature and wholly speculative and when the party demanding upon the performance bond is over-securitised. In such scenario, the applicant party had made out a case of unconscionability in justifying stoppage of the encashment of the bond on the balance of convenience.*

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application for – Application for injunction to restrain pay out and receipt of performance bond monies pending resolution of disputes – Whether concerns on losses and damages premature and speculative – Whether defendant property developer over securitised – Whether plaintiff construction company made out case of unconscionability in justifying stoppage of encashment of bond on balance of convenience*

CONTRACT: *Construction contract – Works – Suspension of work projects – Demand on performance bond – Application for injunction to restrain pay out and receipt of performance bond monies pending resolution of disputes – Whether concerns on losses and damages premature and speculative – Whether defendant property developer over securitised – Whether plaintiff construction company made out case of unconscionability in justifying stoppage of encashment of bond on balance of convenience*

This was an interlocutory application for an injunction to restrain the pay-out and receipt of a performance bond monies pending the resolution of disputes pursuant to a construction contract in arbitration proceedings. The plaintiff was a private limited company involved in construction works and general trading business, the first defendant was a licensed bank and the second defendant was a private limited company involved in property development business. The second defendant was the developer of a project ('project'). The second defendant appointed the plaintiff as the main contractor to carry out, complete and maintain the project. The parties thereafter executed the PAM agreement and Conditions of Building Contract ('PAM conditions') ('LOA and PAM conditions collectively 'construction contract'). Pursuant to the construction contract, the plaintiff procured from

the first defendant a performance bond/bank guarantee ('bond') in favour of the second defendant. The plaintiff took possession of the project works and carried out the project works accordingly. However, the second defendant failed to pay the plaintiff in accordance with the construction contract and the plaintiff suspended the project works after issuing several notices pursuant to cl. 30.7 of the PAM conditions. In consequence, the second defendant determined the plaintiff's employment under the construction contract pursuant to cls. 25.1(b) and (c) of the PAM conditions. The plaintiff disputed the aforesaid determination of its employment and as a result, the plaintiff and the second defendant executed a supplementary agreement ('supplementary agreement') to resume the project works. Notwithstanding the resumption of the project works thereafter, the second defendant still failed to pay the plaintiff in accordance with the construction contract and supplementary agreement. The plaintiff was also not granted the extension of time to complete the project works as sought. As a result, the plaintiff issued its notice of demand for the outstanding payment and thereafter upon the second defendant's default in making payment again suspended the project works after issuing its notice. In consequence, the second defendant again determined the plaintiff's employment under the construction contract pursuant to cl. 25(1)(c) of the PAM conditions. Additionally, the second defendant also demanded on the bond from the first defendant. The plaintiff again disputed the aforesaid determination of its employment under the construction contract and filed this originating summons ('application') for reliefs pending the disposal of the disputes between the plaintiff and the second defendant in arbitration proceedings. The plaintiff basically contended that the bond was a conditional demand guarantee as opposed to an on-demand guarantee simpliciter by reason of the need of fulfilment of certain conditions stipulated in the bond. According to the plaintiff, the second defendant must affirmatively establish that the plaintiff had defaulted or breached the construction contract and/or supplementary agreement before it was entitled to demand upon the bond on its true construction. That notwithstanding, the plaintiff further contended that pay-out of the bond to the second defendant would be unconscionable because the second defendant's determination of the plaintiff's employment under the construction contract was unreasonable and vexatious as well as that the second defendant would be over-securitised especially since the second defendant had failed to pay the plaintiff its dues under the construction contract. In opposition, the second defendant replied that it was entitled to call upon and encash the bond which was, in nature and substance, an on-demand guarantee due to the plaintiff's default in not proceeding with the execution of the project works regularly and diligently. According to the second defendant, the monies receivable by the second defendant was required to finance and compensate the second defendant's loss and damage.

A B C D E F G H I

Held (allowing para. (e) of application):

(1) In light of the rival contentions advanced against each other, these contentions constituted contractual disputes which could only meaningfully be resolved in the forthcoming arbitration proceedings when all relevant evidence are adduced and these contentions be examined and determined on their merits. They were, at best, presently serious issues to be tried in satisfaction of the first limb of the requisite interlocutory injunction tests on injunction against performance bond. However, the determination of the plaintiff's employment could not at this juncture be ascertained as either unlawful or indefensible that *ipso facto* rendered the resultant demand against the bond unconscionable. (para 26)

(2) The bond is an on-demand bond simpliciter and the second defendant need not prove but merely to assert the default on the part of the plaintiff in its demand. In this respect, the second defendant's written demand was scrutinised and this court was satisfied that the requisite assertion of default: 'China Construction Pearl River (M) Sdn Bhd has in breach of its obligations under the contract and we have terminated their employment for the above project under the contract on 22 September 2021' had been adequately made by the second defendant. Hence, the bond had been triggered for pay-out. There was also nothing in the supplementary agreement that plainly vitiated the contract based on the Contracts Act 1950. There is generally freedom of contract; thus, onerous terms freely agreed to by the parties remain binding and enforceable. This court was unable to conclude that the demand against the bond by the second defendant made in reliance on the provisions of the supplementary agreement was *ipso facto* unconscionable. (paras 29 & 30)

(3) The plaintiff's employment under the construction contract was already determined by the second defendant before the original contractual completion date expired. That notwithstanding, the plaintiff's contractual entitlement to extension of time under the construction contract had also not even been taken into account. In the premises, the second defendant's concerns on project delay losses as well as liquidated and ascertained damages due to late completion of the project caused by the plaintiff was both premature and wholly speculative. Furthermore, even if the plaintiff was culpable for the eventual delayed completion of the project, the losses of the second defendant had to be proved and assessed by way of general damages because the contractual liquidated and ascertained damages provision in the construction contract was probably inoperative by reason of the determination of the plaintiff's employment under the construction contract. There was no cogent evidence of the actual losses incurred by the second defendant produced

herein. That notwithstanding, the contractual rate of liquidated damages was also the limitation of liability as provided in s. 75 of the Contracts Act 1950. (para 37)

(4) The second defendant's alleged debit of RM18,911,993.47 against the plaintiff was presently conjectural and unreliable. *Albeit* seriously arguable, the second defendant had at best presently the set off of RM974,000 for the penalty pursuant to the supplementary agreement. Thus, even only if the set off of RM974,000 was accounted against the certified payments of RM4,719,336.58, there was still the credit balance in the sum of RM3,745,336.58 in favour of the plaintiff withheld by the second defendant. The second defendant was hence, already over-securitised without need to demand against the bond. (paras 38 & 39)

(5) The plaintiff had made out a case of unconscionability in justifying stoppage of the encashment of the bond by the second defendant on the balance of convenience. The plaintiff had also sufficiently made its disclosure as required under O. 29 r. 1(2A) of the Rules of Court 2012 to justify the grant of the *ex parte* injunction particularly in light of the urgency to prevent pay out by the first defendant. (paras 40 & 42)

Case(s) referred to:

Ahmad Zaki Sdn Bhd v. SN Akmida Holdings Sdn Bhd [2021] 1 LNS 648 CA ***(refd)***

Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd [2015] 1 LNS 1290 HC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Fulloop Sdn Bhd v. Crest Builder Sdn Bhd & Anor [2013] 1 LNS 761 HC ***(refd)***

Humboldt Wedag GmbH & Anor v. Perak-Hanjoong Simen Sdn Bhd [2015] 4 CLJ 774 HC ***(refd)***

JBE Properties Pte Ltd v. Gammon Pte Ltd [2011] 2 SLR 47 ***(refd)***

MCC Overseas (M) Sdn Bhd v. Malayan Banking Bhd & Ors [2021] 1 LNS 851 HC ***(refd)***

Nik Sharifuddin Nik Kadir v. Mohaiyani Securities Sdn Bhd [1994] 4 CLJ 402 HC ***(refd)***

SN Akmida Holdings Sdn Bhd v. Ahmad Zaki Sdn Bhd [2020] 4 CLJ 564 HC ***(refd)***

Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd [2004] 6 CLJ 25 HC ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 CA ***(refd)***

Triple Point Technology Inc v. PTT Public Company Ltd [2021] UKSC 29 ***(refd)***

United Kingdom Independence Party Limited v. Richard Braine & 4 Ors [2019] EWHC 3527 QB ***(refd)***

York International Pte Ltd v. Voltas Ltd [2013] 3 SLR 1142 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Rules of Court 2012, O. 29 r. 1(2A)

For the plaintiff - Lee Kong Han & Noor Muslihah Marhaban; M/s Hew, Lee & Co
For the 1st defendant - Denise Teoh Gaiy Eeng; M/s Shook Lin & Bok
For the 2nd defendant - Jonas Lee Fook Khong & Esther Khor Hui Hui; M/s David Gurupatham & Koay

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is an interlocutory application for an injunction to restrain the pay-out and receipt of a performance bond monies pending the resolution of disputes pursuant to a construction contract in arbitration proceedings.

[2] The plaintiff is a private limited company involved in construction works and general trading business.

[3] The first defendant is a licensed bank pursuant to the Financial Services Act 2013.

[4] The second defendant is a private limited company involved in property development business.

Background And Preliminary

[5] The second defendant is the developer of the project described as the "Proposed Commercial Development on NT. 213008372, NT. 213008407, NT. 213008416 & NT. 213134055 at Jalan Pintas, District of Penampang - Phase 1: Part 3 & 4 Storey Shop, Office and Mall, - Phase 2: 28-storey Retail/Showroom/Suites" ("project").

[6] By a letter of award and acceptance dated 20 May 2020 ("LOA"), the second defendant appointed the plaintiff as the main contractor to carry out, complete and maintain the project that was partly constructed by a previous main contractor of the second defendant.

[7] The parties thereafter also executed the PAM Agreement and Conditions of Building Contract (2006 ed.) ("PAM conditions") (LOA and PAM conditions collectively "construction contract").

[8] Pursuant to the construction contract, the plaintiff procured from the first defendant a performance bond/bank guarantee (Ref No: LG29501C00000) in the sum of RM3,535,000 ("bond") in favour of the second defendant. The bond is set out below:

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PAGE 1 OF 2

ICBC

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OUR REF: LG29501C000040

DATE: 29TH JULY 2020

SEMANGAT GLOBAL SDN BHD
LOT 3A AND 5, 1ST FLOOR, BLOCK A,
BUNDUSAN SQUARE, JALAN BUNDUSAN,
88300 KOTA KINABALU, SABAH, MALAYSIA

C

BANK GUARANTEE FOR PERFORMANCE BOND

THIS GUARANTEE IS MADE THE 29TH DAY OF JULY 2020 BETWEEN **INDUSTRIAL AND COMMERCIAL BANK OF CHINA (MALAYSIA) BERHAD** OF LEVEL 10, MENARA MAXIS, KUALA LUMPUR CITY CENTER, 50088 KUALA LUMPUR, MALAYSIA (HEREINAFTER CALLED 'THE GUARANTOR') OF THE ONE PART AND **SEMANGAT GLOBAL SDN BHD** (HEREINAFTER CALLED 'THE EMPLOYER') OF THE OTHER PART.

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WHEREAS

1. THIS GUARANTEE IS MADE TO A CONTRACT (HEREINAFTER CALLED 'THE CONTRACT') DATED THE 20TH DAY OF MAY 2020 AND MADE BETWEEN **CHINA CONSTRUCTION PEARL RIVER (M) SDN BHD** OF E05A1, 5TH FLOOR, EAST BLOCK WISMA GOLDEN EAGLE REALTY, 142B, JALAN AMPANG, 50450 KUALA LUMPUR, MALAYSIA (HEREINAFTER CALLED 'THE CONTRACTOR') OF THE ONE PART AND THE EMPLOYER OF THE OTHER PART WHEREBY THE CONTRACTOR AGREED AND UNDERTOOK TO **PROPOSED COMMERCIAL DEVELOPMENT ON NT. 213134055 AT JALAN PINTAS, DISTRICT OF PENAMPANG**
PHASE 1: PART OF 3 AND 4 STOREY SHOP, OFFICE AND MALL
PHASE 2: 28-STOREY RETAIL / SHOWROOM / SUITES
FOR SUM OF MALAYSIA RINGGIT: SEVENTY MILLION SEVEN HUNDRED THOUSAND ONLY (RM:70,700,000.00).

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2. THE GUARANTOR HAS AGREED TO GUARANTEE THE DUE PERFORMANCE OF THE SAID CONTRACT IN THE MANNER HEREINAFTER APPEARING.

NOW THE GUARANTOR HEREBY AGREES WITH THE EMPLOYER AS FOLLOWS:-

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1. IF THE CONTRACTOR SHALL IN ANY RESPECT FAIL TO EXECUTE THE CONTRACT OR COMMIT ANY BREACH OF HIS OBLIGATIONS THEREUNDER THEN THE GUARANTOR SHALL WITHIN FIFTEEN (15) BUSINESS DAYS PAY TO THE EMPLOYER UP TO AND NOT EXCEEDING THE SUM OF **RINGGIT MALAYSIA: THREE MILLION FIVE HUNDRED THIRTY FIVE THOUSAND ONLY (RM3,535,000.00)** (HEREINAFTER CALLED 'THE GUARANTEE SUM') REPRESENTING 5 PCT OF THE CONTRACT VALUE OR SUCH PART THEREOF, ON THE EMPLOYER'S WRITTEN DEMAND STATING THAT THE CONTRACTOR IS IN BREACH OF ITS OBLIGATIONS UNDER THE CONTRACT AND THE

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INDUSTRIAL AND COMMERCIAL BANK OF CHINA (MALAYSIA) BERHAD
Level 10, Menara Maxis, Kuala Lumpur City Center, 50088 Kuala Lumpur, Malaysia.
S/N fBuKkkeK5UKwuBF: Tel: +603-2301 3388 Fax: +603-2301 3388 Website: www.icbcmy.com
**Note : Serial number will be used to verify the originality of this document via eFILING portal

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PAGE 2 OF 2

ICBC

OUR REF: LG29501C000040

DATE: 29TH JULY 2020

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RESPECT IN WHICH THE CONTRACTOR IS IN BREACH, NOTWITHSTANDING ANY CONTESTATION OR PROTEST BY THE CONTRACTOR OR BY THE GUARANTOR OR BY ANY OTHER THIRD PARTY. PROVIDED ALWAYS THAT THE TOTAL OF ALL PARTIAL DEMANDS SO MADE SHALL NOT EXCEED THE GUARANTEE SUM AND THAT THE GUARANTOR'S LIABILITY TO PAY THE EMPLOYER AS AFORESAID SHALL

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CORRESPONDINGLY BE REDUCED PROPORTIONATE TO ANY PARTIAL DEMAND HAVING BEEN MADE AS AFORESAID.

2. THE GUARANTOR SHALL NOT BE DISCHARGED OR RELEASED FROM THIS GUARANTEE BY ANY ARRANGEMENT BETWEEN THE CONTRACTOR AND THE EMPLOYER WITH OR WITHOUT THE CONSENT OF THE GUARANTOR OR BY ANY ALTERATION IN THE OBLIGATIONS UNDERTAKEN BY THE CONTRACTOR OR BY ANY

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FORBEARANCE WHETHER AS TO PAYMENT, TIME OR PERFORMANCE.

3. THIS GUARANTEE SHALL NOT BE ASSIGNED OR TRANSFERRED.

4. THIS GUARANTEE SHALL BE IRREVOCABLE AND SHALL REMAIN IN FULL FORCE AND EFFECT FROM THE ISSUING DATE UNTIL **15TH OCTOBER 2022** (HEREINAFTER CALLED

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'THE EXPIRY DATE'). CLAIMS, IF ANY, MUST BE RECEIVED BY THE GUARANTOR PRIOR TO THE EXPIRY DATE, FAILING WHICH THE GUARANTOR'S OBLIGATION TO PAY UNDER THIS GUARANTEE SHALL BECOME NULL AND VOID NOTWITHSTANDING THE FACT THAT THIS GUARANTEE MAY NOT HAVE BEEN RETURNED TO THE GUARANTOR'S FOR CANCELLATION.

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5. THIS GUARANTEE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF MALAYSIA AND THE PARTIES HEREBY AGREE TO SUBMIT TO THE JURISDICTION OF THE MALAYSIAN COURTS.

SIGNED FOR AND ON BEHALF OF)
INDUSTRIAL AND COMMERCIAL BANK)
OF CHINA (MALAYSIA) BERHAD)
IN THE PRESENCE OF:-)

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.....
SIGNATURE
NAME: CHOON LAI PENG / NG CHEE KEONG
DESIGNATION: BANK OFFICER

.....
WITNESS SIGNATURE
NAME: JENNIFER TAN CHIN CHIN
DESIGNATION: BANK OFFICER

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[9] The plaintiff took possession of the partially completed project works on 15 June 2020 and carried out the project works accordingly. The contractual completion date of the project works is fixed on 15 July 2022.

[10] However, the second defendant failed to pay the plaintiff in accordance with the construction contract and the plaintiff suspended the project works after issuing its notices dated 4 and 12 December 2020 pursuant to cl. 30.7 of the PAM conditions.

[11] In consequence, the second defendant on 5 February 2021 determined the plaintiff's employment under the construction contract pursuant to cls. 25.1(b) and (c) of the PAM conditions.

[12] The plaintiff disputed the aforesaid determination of its employment and as the result, the plaintiff and second defendant on 20 February 2021 executed a supplementary agreement ("supplementary agreement") to resume the project works.

[13] Notwithstanding the resumption of the project works thereafter, the second defendant still failed to pay the plaintiff in accordance with the construction contract and supplementary agreement. The plaintiff was also not granted the extension of time to complete the project works as sought.

[14] As the result, the plaintiff on 3 September 2021 issued its notice of demand for the outstanding payment and thereafter upon the second defendant's default in making payment again suspended the project works after issuing its notice dated 17 September 2021.

[15] In consequence, the second defendant again on 22 September 2021 determined the plaintiff's employment under the construction contract pursuant to cl. 25.1(c) of the PAM conditions.

[16] Additionally, the second defendant on 22 September 2021 also demanded on the bond from the first defendant. The second defendant's demand is set out below:

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SEMANGAT GLOBAL SDN BHD (802160-P)
Lot 3A & 5, 1st Floor, Block A, Bundusan Square,
Jalan Bundusan, 88300 Kota Kinabalu, Sabah. Malaysia.
(T): +6088-732997 & 732998 (F): +6088-732889

Ref: SGSB/GEN/1060/0921
Date: September 22, 2021

RECEIVED
23 SEP 2021
ICBC (MALAYSIA) BERHAD
TRADE FINANCE DEPARTMENT

C

INDUSTRIAL AND COMMERCIAL BANK OF CHINA (MALAYSIA) BERHAD
Level 10, Menara Maxis,
Kuala Lumpur City Center
50088 Kuala Lumpur
Malaysia

Attn.: Choon Lai Peng/Ng Chee Keong

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PROJECT TITLE:	PROPOSED COMMERCIAL DEVELOPMENT ON NT.213134055 AT JALAN PINTAS, DISTRICT OF PENAMPANG PHASE 1: PART OF 3 AND 4 STOREY SHOP, OFFICE AND MALL PHASE 2: 28-STOREY RETAIL/SHOWROOM/SUITES
SUBJECT:	DEMAND OF BANK GUARANTEE FOR PERFORMANCE BOND (BANK GUARANTEE REF. NO. LG29501C000040)

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With reference to the above, we would like to demand the full amount of RM3,535,000.00 from the above mentioned Bank Guarantee for Performance Bond for the above project as the Contractor, China Construction Pearl River (M) Sdn Bhd has in breach of its obligations under the Contract and we have terminated their employment for the above project under the Contract on 22nd September 2021. For your information, a copy of the Notice of Determine the Employment of the Contractor is attached herein.

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Please deposit the full guarantee amount of RM3,535,000.00 into our Maybank account (a/c no. 5101-4364-2866) within 15 days of this letter hereof as stipulated in the above said Guarantee.

Kindly acknowledge receipt of this letter by signing where indicated below.

Thank you.

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Yours faithfully,
SEMANGAT GLOBAL SDN BHD

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SEMANGAT GLOBAL SDN BHD Co No 802160-P

Tee Horng Wee
Director & Chief Executive Officer

...2/-

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S/N f9uKkkeK5UKwul8FuNc1Qg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

A

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SEMANGAT GLOBAL SDN BHD (802160-P)
Lot 3A & 5, 1st Floor, Block A, Bundusan Square,
Jalan Bundusan, 88300 Kota Kinabalu, Sabah, Malaysia.
(T): +6088-732997 & 732998 (F): +6088-732889

C

Ref: SGSB/GEN/1060/0921
Date: September 22, 2021

ACKNOWLEDGEMENT

D

The undersigned representing.....
Hereby acknowledge receipt of the above Letter of Demand.

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.....
Signature & Company Stamp

Name:

Date:

Designation:

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[17] The plaintiff again disputed the aforesaid determination of its employment under the construction contract and on 27 September 2021 filed this originating summons ("application") for reliefs pending the disposal of the disputes between the plaintiff and the second defendant in arbitration proceedings. Pending the disposal of the application, I granted an *ex parte* interim injunction and which was subsequently extended *inter partes* to restrain the second defendant's receipt of the bond monies as sought by the plaintiff.

[18] The affidavits which were filed for purposes of this application are as follows:

(i) plaintiff's affidavits in support affirmed by Chin Chee Seong dated 27 September 2021;

(ii) second defendant's affidavit in reply and affidavit in support affirmed by Tee Hong Wee dated 12 October 2021;

(iii) plaintiff's affidavit in reply affirmed by Chin Chee Seong dated 27 October 2021;

(iv) second defendant's affidavit in reply no. 2 affirmed by Tee Hong Wee dated 10 November 2021; and

(v) plaintiff's affidavit in reply no. 2 affirmed by Chin Chee Seong dated 23 November 2021.

[19] The application was fixed for hearing on 6 May 2022. After having read the written submissions furnished by the parties as well as heard oral arguments of counsel (the first defendant took a neutral position leaving it to court to decide accordingly), I deferred my decision to deliberate on the arguments put forth by them.

[20] Now having done so, I hereby furnish below my decision together with the supporting grounds.

Contentions And Findings

[21] The plaintiff basically contended that the bond is a conditional demand guarantee as opposed to an on-demand guarantee simpliciter by reason of the need of fulfilment of certain conditions stipulated in the bond. According to the plaintiff, the second defendant must affirmatively establish that the plaintiff has defaulted or breached the construction contract and/or supplementary agreement before it is entitled to demand upon the bond on its true construction following *Nik Sharifuddin Nik Kadir v. Mohaiyani Securities Sdn Bhd* [1994] 4 CLJ 402; [1994] 3 MLJ 551 and the Singapore cases of *JBE Properties Pte Ltd v. Gammon Pte Ltd* [2011] 2 SLR 47 and *York International Pte Ltd v. Voltas Ltd* [2013] 3 SLR 1142.

[22] That notwithstanding, the plaintiff further contended that pay-out of the bond to the second defendant would be unconscionable following *Sumatec Engineering And Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1 FC because the second defendant's determination of the plaintiff's employment under the construction contract was unreasonable and vexatious as well as that the second defendant would be over-securitised especially since the second defendant has failed to pay the plaintiff its dues under the construction contract following *Fulloop Sdn Bhd v. Crest Builder Sdn Bhd & Anor* [2013] 1 LNS 761; [2014] 10 MLJ 192, *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd* [2015] 1 LNS 1290; [2015] MLJU 2320 and *Humboldt Wedag GmbH & Anor v. Perak-Hanjoong Simen Sdn Bhd* [2015] 4 CLJ 774.

[23] In opposition, the second defendant replied that it is entitled to call upon and encash the bond which is in nature and substance an on-demand guarantee due to the plaintiff's default in not proceeding with the execution of the project works regularly and diligently that resulted in the plaintiff having to determine the plaintiff's employment under the construction contract. The monies receivable by the second defendant is required to finance and compensate the second defendant's loss and damage.

[24] I have recently held as follows in *MCC Overseas (M) Sdn Bhd v. Malayan Banking Bhd & Ors* [2021] 1 LNS 851 in respect of applications for injunction against construction performance bonds:

> Law on Interlocutory Injunction on Performance Bonds
>
> [45] That notwithstanding, the law on interlocutory injunction against performance bond is trite. In the Supreme Court case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (*supra*), Peh Swee Chin SCJ held as follows:
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> In considering the seller's application for an interlocutory injunction and applying *American Cynamid*; without the need to ascertain the respective strength of the respective cases of the respective parties herein at this stage, the seller had alleged a breach of contracts *ie*, the buyer's presumably repeated refusal to accept the said goods; and the legal failure by the buyer to notify its intention to the seller of claiming damages when buyer had accepted the said goods out of time while time had been earlier agreed to be of the essence. The seller had given in turn the answers to all these. These were serious questions for trial and even though they were not that serious, but nonetheless they could not be described as frivolous or vexatious.
>
> *Next, the question of balance of convenience would fall for consideration.* The first of the principles applicable in regard thereto would be that essentially the remedy of the seller as plaintiff would be in damages and the buyer would undoubtedly be able to pay; the buyers being owned, either directly or ultimately, by one of the world's largest multinational companies. Having

A sought the release of deductions by the buyer earlier, and offering in exchange bank guarantee *ie*, performance bonds, one could infer therefrom some liquidity problem of the seller, and in the absence of anything else, there was some doubt as to whether the seller could financially pay the damages given under a usual undertaking to pay damages on an injunction being guaranteed. While considering other
B factors in conjunction with what has been stated above, there was a special one among them, *ie*, performance bonds of the present sort were involved here. A performance bond, like a pure on-demand guarantee in the instant appeal, has always occupied an important place in the national or international world of commerce. It will be remembered that Lord Diplock in the *American Cynamid* had alluded to special factors to be taken
C into consideration in the particular circumstances of individual cases. We therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted *ex parte* and continued *inter partes* by the learned Judge in favour of the seller, should be discharged, hence the appeal was
D allowed.

[46] It is common ground that both parties relied on the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Co Sdn Bhd* (*supra*) where Abdull Hamid Embong FCJ held as follows on restraining performance bonds:

E [36] We are also in agreement with Mohamad Ariff bin Md Yusof JC in the case of *Focal Asia Sdn Bhd* when he expressed this opinion on these two exceptions and the test to be applied:

If there is clear evidence of fraud in the underlying contract, or unconscionability, the Court can interfere. In these two situations, the integrity and autonomy of
F the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the Court must be clear. I accept the test of "seriously arguable that the only realistic inference is fraud" as good law in an interlocutory application such as the
G present.

...

[39] We are of the considered view that the "seriously arguable and realistic inference" test as used by the learned Judicial Commissioner in *Focal Asia* is equally applicable to the extended exception of
H unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong *prima facie* case' was utilized by the Court of Appeal at the intermediate appeal stage. And the Court of Appeal said this of the required burden now rested on the shoulder of *Sumatec*:

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As in the case of fraud, to establish "unconscionability" there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of "unconscionability" which would basically mean establishing a strong prima facie case. In other words, the Respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of "unconscionability" being committed by the beneficiary (the Appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of "unconscionability" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

We are in agreement with those propositions.

[47] Put simply, it is essential to either establish fraud or unconscionability that is supported with strong cogent evidence to restrain the payout or receipt of moneys under an on-demand performance bond interlocutorily in satisfaction of the balance of convenience after having determined that there are indeed serious issues to be tried between the parties to the contract.

[48] In this Application, MCCO has not relied on fraud but only unconscionability to restrain payout pursuant to the Bond.

[49] Unconscionability has been defined by the online Merriam Webster Dictionary as shockingly unfair or unjust. It is undoubtedly fact sensitive depending on the circumstances of each case.

[50] As illustration, the demand on the performance bond in the Court of Appeal case of *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd* [2011] 7 CLJ 442 was found to be unconscionable when the demand was invalidly made prematurely. In that case, the demand was made without the issuance of the certificate stipulating that the contractor has been in default as prescribed by the underlying contract. In other words, it was a defective demand. Moreover in *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd* [2015] 1 LNS 1290, it was held that the demand on the performance bond is unconscionable because it was made on false pretence of default committed (real reason being that the bond was close to expiration). Also in *Humboldt Wedag GMBH & Anor v. Perak Hanjoong Simen Sdn Bhd* [2015] 4 CLJ 774, it was held that the demand on the guarantees is unconscionable by reason that it was acted to capitalise on the availability of these guarantees but without cogent reasons. Finally in *SN Akmida Holdings Sdn Bhd v. Ahmad Zaki Sdn Bhd* [2020] 4 CLJ 564, I found that demand on the performance bond is unconscionable because it would result in over-securitisation of compensation payable for the default.

[51] However, the existence of serious disputes between the parties pursuant to the underlying contract in the absence of an unfair advantage or oppressive/morally reprehensible conduct of the beneficiary has been held not to be unconscionable in *Ranhill E&C Sdn Bhd v. Thyssenkrupp*

Industries (M) Sdn Bhd [2016] 6 CLJ 290; [2016] 9 MLJ 703, *Gumusut-Kakap Semi Floating Production System (L) Ltd v. Sabah Shell Company Limited (No 2)* [2017] 1 LNS 945 and recently *Sinohydro Corporation (M) Sdn Bhd v. Golden Horse Rubber Sdn Bhd* [2020] 1 LNS 112. (emphasis added)

[25] I have scrutinised the plaintiff's contentions that the second defendant's determination of its employment under the construction contract is unlawful and unconscionable especially in light of the plaintiff's contractual right to suspend work for non-payment of its interim payment certificates. However, the second defendant's defence in retort is that the plaintiff had waived its rights to recover payment for interim payment certificates nos. 4 to 7 pursuant to the supplementary agreement reached between the plaintiff and the second defendant that emanated from the plaintiff's letter ref. CCPRSB/BLH/179 dated 5 February 2021. In other words, the plaintiff would only re-seek payment for and from interim payment certificate no. 8 onwards; hence also having waived its rights to suspend the project works for the outstanding unpaid interim payment certificates. That notwithstanding, the second defendant further contended that the plaintiff plainly failed to reduce the project works delay not to exceed 10% as provided in the supplementary agreement. Consequently, the second defendant is justified to determination of the plaintiff employment under construction contract in the circumstances.

[26] In light of the rival contentions advanced against each other, I find that these contentions constituted contractual disputes which can only meaningfully be resolved in the forthcoming arbitration proceedings when all relevant evidence are adduced and these contentions be examined and determined on their merits. They are, at best, presently serious issues to be tried in satisfaction of the first limb of the requisite interlocutory injunction tests on injunction against performance bond as enunciated in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149. I am however unable to conclude that the second defendant unreasonably or vexatiously determination of the plaintiff's employment under the construction contract as so asserted by the plaintiff. In other words, the determination of the plaintiff's employment cannot at this juncture be ascertained as either unlawful or indefensible that *ipso facto* rendered the resultant demand against the bond unconscionable.

[27] That notwithstanding, the plaintiff went on to contend that the second defendant's demand on the bond is still unconscionable on balance of convenience in the second limb of the requisite interlocutory injunction tests held in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (*supra*) because the bond is a conditional demand guarantee that required the second defendant to have prior proved default on the part of the plaintiff. Reliance has been made on the case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517 FC as well as the

Singapore cases of *JBE Properties Pte Ltd v. Gammon Pte Ltd* (*supra*) and *York International Pte Ltd v. Voltas Ltd* (*supra*). This has been strenuously denied by the second defendant that the bond is *ex-facie* an on-demand bond simpliciter that is payable upon a written demand by the second defendant following *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 4 CLJ 697; [1995] 3 MLJ 449 CA.

[28] The true nature of the bond is a question of construction. On my scrutiny of the same, I find that the operational provisions therein are very similar to that in *Teknik Cekap Sdn Bhd v. Public Bank Bhd* (*supra*) where Shaik Daud bin Mohd Ismail JCA held as follows with emphasis added by me:

> Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wordings of the bond itself.
>
> It is, therefore, pertinent to set out the relevant clause of the bond which has caused this concern in this case. It can be found on the first page of the bond dated 1 June 1992 issued by PBB and is as follows:
>
> > If the sub-contractor (unless relieved from the performance of any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay to the contractor up to and not exceeding the sum of RM422,000 (Malaysian Ringgit: Four Hundred Twenty Two Thousand) only representing 10% of the contract value or such part thereof on the contractor's demand notwithstanding any contestation or protest by the sub-contractor or by the guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the sum of RM422,000 (Malaysian Ringgit: Four Hundred Twenty Two Thousand) only and that the guarantor's liability to pay the Contractor as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.
>
> It "involves a straightforward exercise of constructions, or interpretation, of the bond to discover the intention of the parties." This is the unanimous view expressed in *IE Contractors Ltd. v. Lloyds Bank plc and Rafidian Bank* [1990] 51 BLR 1.
>
> …

In the present case, however, the bond began with the words

> *If* the sub-contractor shall in any respect fail to execute the contract or commit any breach of his obligations thereunder *then* the guarantor shall pay ...

Now from the very wordings of the bond itself it is clear and unequivocal that what would trigger off the guarantee is the sub-contractor's failure to execute the contract or commit any breach thereof. Then and only then would the liability of the guarantor arise. Therefore giving the words in the bond its plain meaning it cannot by any stretch of imagination be said that the bond in the circumstances of this case is an unconditional bond. Similarly in *Esal (Commodities) Ltd. And Relto Ltd. v. Oriental Credit Ltd. And Wells Fargo Bank N.A.* [1985] Lloyd's Law Reports Vol. 2, 546 the performance bond states:

> we undertake to pay the said amount on your written demand *in the event* that the supplier fails to execute the contract in perfect performance

the Court of Appeal held that:

> ... however in addition to the beneficiary making the demand he must also inform the bank that he did so on the basis provided for in the performance bond;

The Court there found that when making the demands the beneficiary did not assert that there was a failure to perform the contract. The Court came to the conclusion that liability under the performance bond was conditional and the condition had not been complied with. The Court went on to say that this interpretation not only gives meaning but also effect to the words "in the event that the supplier fails ..." which otherwise would be mere surplusage. This decision was followed by the Court of Appeal in *IE Contractors* (*supra*). In that case the performance bond states as follows:

> We undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the abovenamed principal.

In this case it was further held that there need not be any precise words as provided for in the performance bond be stated in the letter of demand but such a letter must at least assert in substance, the basis of the claim, which in that claim was damages of breach of contract. The proposition in the *Esal* case was followed by the Singapore High Court in *The Brightside Mechanical and Engineering Services Group Ltd. & Anor. v. Standard Chartered Bank & Anor.* [1989] 3 MLJ 13 where the Court held that since the beneficiary did not in their demand notice indicate that they had made a determination (as required by the performance guarantee) but merely had a belief, the demand notice did not comply with the requirements of the performance guarantee.

The line of authorities seem to indicate that the Courts adopted a strict interpretation of performance bond and that in making demands on them the beneficiary must adhere strictly to their terms. This line of interpretation seems to be more sensible as it requires the beneficiary of the performance bond to state in plain terms that which they must, if honest, be prepared to assert, and may place him in peril of a charge of obtaining money by deception if later it turns out to be untrue to his knowledge. Furthermore banks, other financial institutions and perhaps insurance companies would be left to assume that a breach of the contract had taken place. This is more so as they cannot challenge the demand. The banks are in fact not required to be told the nature of the breach or who is to be blamed for the breach. That is not the concern of the bank but it must be asserted that the demand is made as a result of a breach by the sub-contractor. (emphasis added)

[29] It is therefore plain that the bond is an on-demand bond simpliciter and the second defendant need not prove but merely to assert the default on the part of the plaintiff in its demand. In this respect, I have also scrutinised the second defendant's written demand and I am satisfied that the requisite assertion of default: "China Construction Pearl River (M) Sdn Bhd has in breach of its obligations under the contract and we have terminated their employment for the above project under the contract on 22 September 2021." has been adequately made by the second defendant. I hence find and hold that the bond has been triggered for pay-out.

[30] As a result and moving on to the next instance of unconscionability raised by the plaintiff that the terms of the supplementary agreement are unconscionable in that they benefitted the second defendant in oppression of the plaintiff's rights, I have reviewed the supplementary agreement accordingly but I do not find anything therein that plainly vitiates the contract based on the Contracts Act 1950. Furthermore, there is generally freedom of contract; thus, onerous terms freely agreed to by the parties remain binding and enforceable. I am therefore unable to conclude that the demand against the bond by the second defendant made in reliance on provisions of the supplementary agreement is *ipso facto* unconscionable.

[31] As to the final instance of unconscionability of over-securitisation as advanced by the plaintiff, I have held as follows in *SN Akmida Holdings Sdn Bhd v. Ahmad Zaki Sdn Bhd* [2020] 4 CLJ 564 (tacitly approved in this respect on appeal in *Ahmad Zaki Sdn Bhd v. SN Akmida Holdings Sdn Bhd* [2021] 1 LNS 648) as follows:

[50] In the Singapore case of *Raymond Construction Pte Ltd v. Low Yang Tong & Anor* (*supra*), it was held to be unconscionable in respect of a demand of S$26,158.70 for alleged defective work under the performance guarantee for the sum of S$40,419.05 by the employer for alleged defective work when the contractor was owed S$229,417 or about 30% of the contract sum due to the employer's prevention of the architect issuing an interim certificate to the contractor. Similarly, the equitable jurisdiction was exercised in the earlier Singapore case of *Royal Design Studio Pte Ltd*

v. Chang Development Pte Ltd [1990] SLR 1116 when the employer called on the performance bond notwithstanding that it was in default by refusing to pay the agreed upon interim payments when the building contractor had substantially fulfilled its obligations. In addition, the director of the building contractor provided a personal guarantee and the employer also held a considerable sum of money from sale of properties in which the building contractor had equitable interest.

[51] It may therefore be concluded that over-securitisation as the result of the beneficiary demanding upon the bond/guarantee is unconscionable. This court shared a similar concern in *Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd* (*supra*). In the circumstances here, the defendant owed the plaintiff the sum of RM15,773,980.20. The only tangible sum arguably recoverable by the defendant for un-recouped advance payment is merely RM8,045,173.71. The other alleged right of the defendant to recover and be secured for potential liquidated and ascertained damages is overly arbitrary and speculative as claimed. It is presently unquantifiable and must hence accordingly be discarded. Consequently, it is manifestly unfair without justification for the defendant to demand either upon the performance bond or advance payment guarantee because the amount owing by the defendant to the plaintiff is already adequate to safeguard the defendant's financial exposure as disclosed pending the disposal of the arbitration proceedings between the parties.

[32] The plaintiff contended that the second defendant owed the plaintiff the sum of RM141,073.90 pursuant to interim payment certificate no. 4, RM131,740.28 pursuant to interim payment certificate no. 5, RM4,446,522.40 pursuant to interim certificate no. 6 (A)(R1) totalling RM4,719,336.58. In addition, the plaintiff has claimed the sum of RM2,744,001.41 in its interim payment claim no. 7 but interim payment certificate no. 7 that it overdue has not been issued. The cumulative sums amounted to RM7,463,337.99.

[33] However by reason of the second defendant's determination of the plaintiff's employment under the construction contract, the second defendant counter-contended that there is the sum of RM18,911,993.47 owing by the plaintiff to the second defendant comprising of the following:

(i) estimated additional costs to complete the project works amounting to RM12,071,317.86;

(ii) penalty demanded by Theme Global Sdn Bhd amounting to RM1,604,879.61;

(iii) penalty pursuant to the supplementary agreement amounting to RM974,000; and

(iv) liquidated and ascertained damages for late completion amounting to RM4,261,796.

[34] In respect of the plaintiff's contention, I find upon review of the documentary evidence adduced that the amount of RM4,719,336.58 certified pursuant to interim certificates no. 4 to 6A are indisputable. Moreover, no cogent reason has been provided for the non-certification of interim payment claim no. 7 of RM2,744,001.41 by the second defendant.

[35] I therefore find that there is a credit balance of RM7,463,337.99 in favour of the plaintiff withheld by the second defendant.

[36] As to the second defendant's counter-contentions, I find again from the review of the documentary evidence that the cumulative amount of RM18,911,993.47 is basically a projected estimate of loss. This alleged loss arose from the second defendant deliberated termination of the plaintiff's employment rather than the plaintiff itself repudiating by having abandoned the construction contract. With regard to the additional costs to complete the project works, I noted that the second defendant merely produced a sole contractor's tender letter of quotation to complete the project works in an arbitrary period of 26 months at RM143,018,417.86. Against that, the second defendant merely deducted the plaintiff's construction contract sum of RM130,947,100 and claimed for the difference of RM12,071,317.86. I find that this is not the proper way to undertake the accounting of the terminated construction contract by a registered quantity surveyor. It is plainly a simplistic in-expert computation of the likely additional costs of completion incurable which is not an "apple for apple" detail comparison of the value of contract works already undertaken by the plaintiff and to be undertaken by the new completion contractor. The partially completed as well as additional or variation works ordered to be carried out have for example have not been properly accounted. More glaringly, I also find there has not been mitigation measures undertaken by the second defendant *via* requesting for and thereafter taking into consideration quotations of other tenderers too which is the norm in the Malaysian construction industry.

[37] As to the other three counter-contentions of the second defendant, I find that they are all project works delay related. In this regard, it must be appreciated that the plaintiff's employment under the construction contract was already determined by the second defendant before the original contractual completion date expired. That notwithstanding, the plaintiff's contractual entitlement to extension of time under the construction contract has also not even been taken into account. In the premises, I find that the second defendant's concerns on project delay losses such as the penalty demanded by Theme Global Sdn Bhd of RM1,604,879.61 as well as liquidated and ascertained damages of RM4,261,796 due to late completion of the project caused by the plaintiff is both premature and wholly speculative. Furthermore, even if the plaintiff is culpable for the eventual delayed completion of the project, the losses of the second defendant has to

be proved and assessed by way of general damages because the contractual liquidated and ascertained damages provision in the construction contract is probably inoperative by reason of the determination of the plaintiff's employment under the construction contract following the English Supreme Court case of *Triple Point Technology Inc v. PTT Public Company Ltd* [2021] UKSC 29. There is presently no cogent evidence of the actual losses incurred by the second defendant produced before me. That notwithstanding, the contractual rate of liquidated damages is also the limitation of liability as provided in s. 75 of the Contracts Act 1950.

[38] I therefore also find that the second defendant's alleged debit of RM18,911,993.47 against the plaintiff is presently conjectural and unreliable. *Albeit* seriously arguable, the second defendant has at best presently the set off of RM974,000 for the penalty pursuant to the supplementary agreement.

[39] Thus even only if the set off of RM974,000 is accounted against the certified payments of RM4,719,336.58, there is still the credit balance in sum of RM3,745,336.58 in favour of the plaintiff withheld by the second defendant. The second defendant is hence already over-securitised without need to demand against the bond and I so find and hold accordingly.

[40] In the circumstances, I therefore find and hold that the plaintiff has made out a case of unconscionability in justifying stoppage of the encashment of the bond by the second defendant on the balance of convenience. I am mindful that there is currently a contested company winding-up proceeding on-going against the second defendant on its inability to pay its debts. However, and in view of my finding in para. [39] above, this need not be further considered.

[41] For completeness, I noticed that the second defendant has also contended that the plaintiff did not invoke the jurisdiction of the court with clean hands by its failure to make full and frank disclosure when it obtained the *ex parte* interim injunction before me. According to the second defendant, the plaintiff did not disclose its breach of the supplementary agreement *vis-a-vis* the slow progress and persistent delay in the carrying out of the project works that led to the determination of the plaintiff's employment under the contract; otherwise the injunction would not have been allowed following *Tahan Steel Corporation Sdn Bhd v. Bank Islam Malaysia Bhd* [2004] 6 CLJ 25.

[42] I have accordingly re-visited my earlier interlocutory decision and find that the plaintiff has sufficiently made its disclosure as required under O. 29 r. 1(2A) of the Rules of Court 2012 to justify the grant of the *ex parte* injunction particularly in light of the urgency to prevent pay-out by the first defendant. I would still have granted the *ex parte* injunction in the

circumstances that then prevailed even if I was appraised of the facts as now made clearer by the second defendant. In other words, I am satisfied that the material facts highlighting the important features of the case that would otherwise have undermined the application had been made known to me following the English case of *United Kingdom Independence Party Limited v. Richard Braine & 4 Ors* [2019] EWHC 3527 QB.

Conclusion

[43] For the foregoing reasons particularly as stated in para. [40] above, I therefore allow para. (e) of the application with costs of RM5,000 to be paid by the second defendant subject to the usual allocator. The plaintiff shall pay cost of RM2,000 to the first defendant subject to the usual allocator.